SUPREME COURT, U. S.

No. 73-1658

In the

Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U.S.
FILED
MAY
MICHAEL

PACIFIC FAR EAST LINE, INC.,
Petitioner,

vs.

HARTFORD FIRE INSURANCE COMPANY,
Responent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOHN HAYS
260 California Street
San Francisco, CA 94111
Counsel for Petitioner

Of Counsel:
GEORGE L. WADDELL
HARVEY I. WITTENBERG
DORR, COOPER & HAYS
260 California Street
San Francisco, CA 94111

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statutes, Federal Rules and Regulations Involved	2
Statement	2
Reasons for Granting the Writ	3
Conclusion	15
Appendices	

TABLE OF AUTHORITIES CITED

Cases	Pages
Aluminios Pozuelo Ltd. v. S.S. Navigator (2 Cir. 1968) 407 F.2d 152	3, 4, 6, 7, 12, 13
The Bill (D. Md. 1944) 55 F. Supp. 780	14
Caterpillar American Company v. SS Sea Roads (S.D. Fla. 1964) 231 F. Supp. 647, aff'd per curiam (5 Cir. 1956) 364 F.2d 829	6, 14
Cie Generale Transatlantique c. Cies. The Marine Insurance Co., La Prevoyance, Assurances Generales et autres (Court d' Appel de Paris, 5ieme Chambre, Oct. 24, 1966) 19 Le Droit Maritime Francais 23	15
Companhia Hidro Electrica v. "Loide Honduras" (S.D. N.Y. 1974) 368 F. Supp. 289	12, 13
Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer (2 Cir. 1969) 422 F.2d 7	6
Falconbridge Nickel Mines v. Chimo Shipping [1973] 2 Lloyds L. Rep. 470	14
General Motors Corp. v. Moore-McCormack Lines, Inc. (2 Cir. 1971) 451 F.2d 24	13, 14
Gulf Italia Company v. American Export Lines, Inc. (2 Cir. 1959) 263 F.2d 135, cert. denied 360 U.S. 902 (1959)	11, 12, 13
Herd & Co. v. Krawill Machinery Corp. (1959) 359 U.S. 297	5
India Supply Mission v. S.S. Overseas Joyce (S.D. N.Y. 1965) 246 F. Supp. 536	14
Leather's Best, Inc. v. Mormaclynx (2 Cir. 1971) 451 F.2d 800	6

Pages

McAllister v. United States (1954) 348 U.S. 19 4
Middle East Agency v. The John B. Waterman (S.D. N.Y. 1949) 86 F. Supp. 487 ..... 6, 11, 13
Mitsubishi International Corp. v. S.S. Palmetto State (2 Cir. 1962) 311 F.2d 382, cert. denied 373 U.S. 922 (1963) 6, 12

Nichimen Company v. M. V. Farland (2 Cir. 1972) 462 F.2d 319 ..... 11, 12, 13

Pannell v. United States Lines Company (2 Cir. 1959) 263 F.2d 497, cert. denied 359 U.S. 1013 (1959) 12, 13
Petition of Isbrandtsen Company (2 Cir. 1953) 201 F.2d 281 ..... 12, 14

Royal Typewriter Co. v. M/V Kulmerland (2 Cir. 1973) 483 F.2d 645 5

Standard Electrica, S.A. v. Hamburg Sudamerikanische, etc. (2 Cir. 1967) 375 F.2d 943, cert. denied 389 U.S. 831 (1967) 12, 13
Stirnimann v. The San Diego (2 Cir. 1945) 148 F.2d 141, affirming (S.D.N.Y. 1944) 55 F.Supp. 709 ..... 11, 13

STATUTES

28 U.S.C.:
§ 1254(1) 2
§ 1333 2

46 U.S.C. § 1304(5) 2, 3, 4, 6, 7, 10, 11, 14, 15
51 Stat. 233; U.S. Treaty Series No. 931 8
51 Stat. 269 9

TEXTS

Pages

Knauth, Ocean Bills of Lading (4th Ed. 1953) 115-132 8

Rene Rodiere, 2 Traité Général de Droit Maritime 302 15

MISCELLANEOUS

De Orchis, M. E., The Container and the Package Limitation—The Search for Predicability (1973) 5 Journal of Maritime Law and Commerce 251 ..... 5, 6

Fairplay International Shipping Weekly, March 21, 1974, The Financial Times Ltd., Volume 250, No. 4,726, p. 93 5

Hearing, Subcommittee of the Committee on Foreign Relations, United States Senate, 70th Congress, 1st Session 10

House Report (74th Congress, 2d Session, House of Representatives, Report No. 2218) Committee on Merchant Marine & Fisheries 10

1 Paul Robert, Dictionaire Alphabetique and Analogique (1966) 819 8

Senate Report (74th Congress, 1st Session, Senate Report No. 742) Committee on Commerce 10

Webster's New Collegiate Dictionary (1973 Edition) 8

In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

PACIFIC FAR EAST LINE, INC.,
Petitioner,

vs.

HARTFORD FIRE INSURANCE COMPANY,
Responent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Pacific Far East Line, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on February 4, 1974.

OPINIONS BELOW

The opinion of the District Court for the Northern District of California is reported at 320 F. Supp. 324 and in 1971 A.M.C. 708. The opinion of the Court of Appeals for the Ninth Circuit is reported at 491 F.2d 960. Copies of both opinions are appended to this petition as Appendices A and B, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was dated and entered February 4, 1974. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court is based on 28 U.S.C. § 1333.

QUESTION PRESENTED

The sole question presented for review is whether an electrical transformer weighing approximately 36,700 lbs. mounted on a wooden skid is a "package" within the meaning of Sec. 4(5) of the Carriage of Goods by Sea Act (46 U.S.C. § 1304(5)).

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

The only statute, rule or regulation involved is Section 4(5) of the Carriage of Goods by Sea Act (hereinafter referred to as "COGSA") which is Sec. 1304(5) of Title 46 of the U.S. Code and the text of which is as follows:

> (5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

STATEMENT

This suit is for damage to a 10,000 KV transformer insured by Hartford Fire Insurance Company (hereinafter

"Hartford"), plaintiff and appellant below, which occurred during ocean transportation from San Francisco to Guam on SS Pacific Bear, a merchant vessel owned and operated by petitioner Pacific Far East Line, Inc. (hereinafter "PFEL").

The transformer was 17′ 1″ high, 11′ 7″ long, 7′ 8″ wide, approximately 36,700 pounds in weight and in preparation for the trip had been mounted on, and bolted to, a heavy wooden skid. On arrival at Guam, damage alleged to be in excess of $5,000 was discovered.

The District Court first tried the issue of the applicability of Section 4(5) and held, on the authority of *Aluminios Pozuelo Ltd. v. S.S. Navigator* (2 Cir. 1968) 407 F.2d 152, that it applied (Appendices B and C). Thereafter, the extent of the damage having been found to exceed $500, judgment on findings of fact and conclusions of law (Appendix D) was entered for $500.

The Court of Appeals reversed. In so doing it declined to follow or distinguish the case of *Aluminios Pozuelo Ltd. v. S. S. Navigator, supra,*[1] relied on by the District Court, in which the Court of Appeals for the Second Circuit had held a three ton toggle press similarly fastened to a wooden skid to be a package so as to limit recovery to $500.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed (i) because it is in conflict with the decision of another court of appeals on the same question; (ii) because it decided an important question in a currently active area of federal admiralty law which has not been, but should be, settled by this Court in order to avoid disruption of the orderly conduct of the business of handling cargo loss and damage claims; (iii) because

1. Hereinafter referred to as *Aluminios.*

the decision erroneously interprets COGSA and does so in a way which will tend to promote disagreement and litigation; and (iv) because such a review will provide an opportunity for this Court to correct a long-standing and fundamental error in the interpretation of COGSA extending far beyond the relatively narrow point decided below and which has produced much litigation and will continue to do so if left uncorrected.

1. While the Court of Appeals in the decision below did not expressly declare its disagreement with the decision of the Second Circuit in *Aluminios* the two decisions cannot be reconciled.[2] Both courts considered that they were deciding a question of law, not merely reviewing a finding of fact by the District Court, to which each would presumably have applied the substantial evidence rule of *McAllister v. United States* (1954) 348 U.S. 19. An effort by Hartford in the court below to distinguish *Aluminios* was rejected (491 F.2d at 965, Appendix A, p. 10).

As the District Court noted:

> "[T]he position of plaintiff is a frontal assault upon the decision of the Second Circuit in the leading case of *Aluminios Pozuelo Ltd. v. S.S. Navigator,* 407 F.2d 152 (1968). No distinction between the present case and *Aluminios Pozuelo* is suggested, and none appears tenable" (320 F.Supp. at 325; Appendix B, p. 13).

2. Although no case involving the nature of a package under Section 4(5) has come before this Court since the

---

2. "We hold that the electrical transformer bolted to a wooden skid was 'not shipped in [a] package.'" (Opinion of the court below, 491 F.2d at 965; Appendix A, p. 11)

"For the reasons stated, we hold that the skidded toggle press is a 'package' as specified in Section 4(5) of COGSA and that liability was properly limited to $500." (Aluminios, supra, at 156)

adoption of COGSA in 1936,[3] such cases have come before the district courts and the courts of appeals with increasing frequency. An attempt has been made to list all such cases in Appendix F.[4] Extensive litigation involving skidded equipment and machinery can be avoided only if the status of such cargo as packages is now laid to rest.

A conflict between the circuits or other uncertainty in the law has a particularly pernicious effect in the shipping industry in which a continuous claims-handling and settling process is going on throughout the maritime states of the United States and countries of the world.[5] As things now stand, cargo interests (normally underwriters) and steamship claims agents or their P. & I. underwriters will not be able intelligently to settle claims for damage to skidded machinery and similar cargo until the court where the case will be brought to trial becomes known; and, in cases where the place of trial will be in a circuit other than the Second or Ninth, settlement may not be possible at all. Of course, forum-shopping will cause such claims to be sued on in the Ninth Circuit whenever possible.

---

3. In Herd & Co. v. Krawill Machinery Corp. (1959) 359 U.S. 297, a "case" containing a 19 ton press was assumed to be a package.

4. Many of the more recent of these involve the vexing question of if and when a container is a package and arise out of the revolutionary change in ocean cargo-carrying methods known as "containerization" e.g. Royal Typewriter Co. v. M/V Kulmerland (2 Cir. 1973) 483 F.2d 645; M. E. De Orchis, The Container and the Package Limitation—The Search for Predictability (1973) 5 Journal of Maritime Law and Commerce 251.

5. The holding has already been noted in Fairplay International Shipping Weekly of March 21, 1974, published in London by The Financial Times Ltd., Volume 250, No. 4,726, p. 93 with the observation on the "contradictory" American decisions that "the sooner a sensible precedent is set—one which cannot be misconstrued—the earlier cargo insurers will be able properly to evaluate their risks and shippers will know the exact extent of their coverage under the Act."

3. The error in the analysis of the court below exists on two levels. The first is in rejecting the sensible and well-supported rule of *Aluminios* and substituting no rule at all; and the second, shared by both decisions and dealt with in point 4 below, is in failing to recognize that *any* individually shipped article or thing is a "package" under Section 4(5).

In *Aluminios* after a careful analysis of the prior cases, Judge Moore ruled that (p. 155),

> "The meaning of 'package' which has evolved from the cases can therefore be said to define a class of cargo, irrespective of size, shape or weight, to which some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods."

In concluding that this definition of "package" included a skidded piece of machinery, he relied heavily on the fact that *Middle East Agency v. The John B. Waterman* (S.D. N.Y. 1949) 86 F. Supp. 487, which also so held, had been on the books for nearly twenty years; and, with a realism not always found in the courts, he recognized that, in this industry, carriers and cargo interests require certainty and predictability and gain it through their knowledge of and reliance on court decisions (407 F. 2d at 156).[6] Other cases had also alluded to skids in a manner implying that their use results in a package.[7]

While the standard laid down in *Aluminios* for judging what is and is not a "package" may not be an automatic

---

6. On the importance of predictability in this area of the law see Leather's Best, Inc. v. Mormaclynx (2 Cir. 1971) 451 F.2d 800, 815; Encyclopaedia Britannica, Inc. v. SS Hong Kong Producer (2 Cir. 1969) 422 F.2d 7, 20 (dissenting opinion); and M. E. De Orchis, supra, note 4.

7. Mitsubishi International Corp. v. S.S. Palmetto State (2 Cir. 1962) 311 F.2d 382, 384; Caterpillar American Company v. SS Sea Roads (S.D. Fla. 1964) 231 F. Supp. 647, 649, aff'd per curiam (5 Cir. 1956) 364 F.2d 829.

litmus for every conceivable form or design of shipping unit, it is one which is reasonably workable and consistent with prior authority and is, therefore, a contribution to the jurisprudential process of continuous clarification of legal concepts which is stare decisis. The decision in the court below, on the other hand, appears to have been made on an ad hoc basis. It makes no pretence at being either consistent or inconsistent with prior authority or in keeping or not with any ascertainable rule of law or other generalization which might be a guide for future cases. In short, it tells us nothing except that henceforth in the Ninth Circuit skidded machinery and equipment will not be treated as packages. In the network of precedent formed by *Aluminios* and prior authorities there are doubtless interstices yet to be filled by future cases; but in the Ninth Circuit the open spaces are very large indeed.

Although the court below did not express any legal principles or guidelines by which it reached its conclusion, its language hints at an erroneous line of reasoning in which the word "in" of the phrase "not shipped in packages" in the second clause (not directly applicable here) of Section 4(5) was used as an aid in defining the controlling word "package" in the first clause.[8] That erroneous line of reason-

8. In five places the court uses the phrase "in a package" to describe cargo entitled to limitation under Section 4(5); and in the final sentence of the opinion the court states that the "transformer bolted to a wooden skid was 'not shipped *in* [a] package'" (italics added), giving the definite impression that the court felt that the $500 package limitation applies only to goods which are *in* a package. On page 8 of its opinion (491 F.2d at 964, Appendix A, p. 8) the court says, "On the other hand, freestanding cargo not enclosed in a box or crate has been held to constitute goods not shipped *in* a 'package'." Strictly speaking, each such item of cargo was held, in the cases referred to, not to *be* a package. Apparently the court felt that the meaning of the general word 'package' in the first clause is somehow narrowed by the use of the word "in" in the second clause such that it can only include things which cargo can be said to be "inside of."

ing consists of positing that "package" as that word is used in the first clause must be something which cargo can be "in" in the sense of "inside of." The analysis is erroneous. The word "package" as it appears in the first clause of Section 4(5) is the operative word and the second clause ("or in case of goods not shipped in packages") is merely to differentiate all other cargoes. The word "in" as used there is no more intended to imply a spatial relationship, much less one intended to modify the earlier word "package," that it does in such phrases as "cargo shipped *in* bulk" or "passengers booked *in* groups" or goods "sold *in* dozens." It is a "function word to indicate means or instrumentality . . . qualification or circumstance",[9] and its use was not intended to be and does not affect the meaning to be attributed to the prior word "package."

Legislative history bears this out. COGSA is derived from the International Convention for the Unification of Certain Rules Relating to (Ocean) Bills of Lading adopted in Brussels in 1924 on the basis of a text drafted at the Hague in 1921 which has come to be known as the "Hague Rules." An outline of the history of the Hague Rules is found in Knauth, *Ocean Bills of Lading* (4th Ed. 1953) 115-132. The original French text (Knauth, supra, pp. 40-70) provided for a limitation of £ 100 sterling "par colis[10] ou unite (id. p. 52). The official State Department translation[11]

---

9. Webster's New Collegiate Dictionary (1973 Edition).

10. The word "colis" does not necessarily imply any wrapping or covering or the like. 3 Nouveau Larrousse Illustré 104 defines "colis," among other things, as an "objet transportable" (in English, of course, a transportable object). To the same effect is 1 Paul Robert, Dictionaire Alphabetique and Analogique (1966) 819:

"Tout objet destine a etre expedie, remis a quelqu' un, a une entreprise de transport" or, in English: Any object destined to be forwarded, sent to someone, to a transport company.

11. 51 Stat. 233; U.S. Treaty Series No. 931.

was "100 pounds sterling per package or unit" (id. p. 53). The official ratification statement of the United States deposited with the Belgian Government June 29, 1937 (id. p. 77) contained a formal "understanding" that the limitation would be "$500, lawful money of the United States of America, per package or unit." Nothing was said of the words which had been added by Congress respecting "goods not shipped in packages" even though the State Department's official Memorandum of June 5, 1937, entitled "Comparison of the Carriage of Goods by Sea Act of the United States of America, approved April 16, 1936, and the Bills of Lading Convention concluded at Brussels, August 25, 1924" (id. pp. 78-85)[12] noted the fact that the statute as actually adopted by Congress had substituted the phrase "or in the case of goods not shipped in packages, per customary freight unit" for the words "or unit" of the Convention. The State Department concluded its memorandum by saying:

> "The foregoing differences from the Convention, made in the Carriage of Goods by Sea Act, are intended primarily (1) to clarify provisions in the Convention which may be of uncertain meaning thereby avoiding expensive litigation in the United States for the purpose of interpretation and (2) to coordinate the Carriage of Goods by Sea Act with other legislation of the United States."

In a note to the Italian ambassador dated March 29, 1938, explaining the "understanding" deposited with the Belgian Government, the State Department said (id. p. 88):

> "It is believed that neither the understandings to which that ratification was made subject nor the provisions of either the Carriage of Goods by Sea Act or the Pomerene Bills of Lading Act are out of harmony with the provisions of the Convention."

---

12. 51 Stat. 269.

Congressional Committee reports contain no hint of any intent to change the Hague Rules by the additional language now found in Section 4(5). The House Report (74th Congress, 2d Session, House of Representatives, Report No. 2218) of the Committee on Merchant Marine & Fisheries says on the point only that (p. 8),

> "Valuation clauses in bills of lading frequently restrict the recovery of the cargo owner to an agreed valuation as low as $100. This bill increases that limit to $500 per package or customary freight unit."

The Senate Report (74th Congress, 1st Session, Senate Report No. 742) of the Committee on Commerce notes only that,

> "After the word 'package,' insert 'lawful money of the United States.' This is to meet the change in our monetary situation."

Judge Charles M. Hough of the Second Circuit, who had been deeply involved in the negotiations since 1922, observed with respect to the American modification of the package clause,

> "I can only submit that the words used in the bill reported out of the committee mean exactly the same thing as 'per package or unit'."[13]

The result is that neither grammatical analysis nor legislative history supports the view that the addition in the United States Carriage of Goods by Sea Act of the language "or in the case of goods not shipped in packages, per customary freight unit" was intended to or does affect in any

---

13. Hearing before a Subcommittee of the Committee on Foreign Relations, United States Senate, 70th Congress, 1st Session, Relative to a Treaty entitled International Convention for Unification of Certain Rules in Regard to Bills of Lading for Carriage of Goods by Sea, December 22, 1927, Part 1, page 32.

way what is meant by "package" under Section 4(5). More specifically, there is no evidence that such additional language was intended to or should limit the concept of a package to an arrangement or a configuration which the cargo can be said to be inside of.

4. The more fundamental error of the Court of Appeals lies in perpetuating a faulty assumption of surprising simplicity. It is the assumption that unless an object or article is enclosed or otherwise given some special preparation for shipment, it cannot be a "package" under Section 4(5). While no case appears ever to have devoted extensive attention to the point, this erroneous assumption was apparently first made in the holding in *Middle East Agency v. The John B. Waterman, supra,* where the court was possibly influenced by dictum in *Stirnimann v. The San Diego* (2 Cir. 1945) 148 F.2d 141, affirming (S.D.N.Y. 1944) 55 F.Supp. 798.[14] The result of this misconception has been that the courts have been required to wrestle with the "elusive"[15] question of exactly how much and what kind of wrapping, casing, covering, mounting or other method of preparing for shipment will be sufficient to render a shipped article a "package"; and a reading of the decisions since *Middle East Agency v. The John B. Waterman,* supra, will reveal a trail of reasoning of unsurpassed twisting, turning, doubling-back and division. Fine distinctions have been made[16] and

---

14. In fact Stirnimann, supra, held "that each of the 126 pieces [of a giant amusement crane] was a separate package or freight unit" (148 F.2d at 143); and the pieces were "entirely unerated in any way" (55 F. Supp. at 799).

15. Friendly, J. in Nichimen Company v. M. V. Farland (2 Cir. 1972) 462 F.2d 319, 334.

16. Compare Gulf Italia Company v. American Export Lines, Inc. (2 Cir. 1959) 263 F.2d 135, holding a partially enclosed tractor not a package, with Aluminios, supra, holding a skidded toggle press a package.

absurd results suggested[17] and much difficult and tortured reasoning exercised, for example, in determining, that unwrapped but strapped coils of steel weighing three to nine tons each were packages[18] and that strapped pallets of six cartons each of TV tuners were packages.[19] Moreover the numerous concurring and dissenting opinions in the package cases indicate divisions of viewpoint within the Second Circuit.[20]

In an effort to avoid the "troublesome" problem of deciding on the basis of physical facts "when is a package not a package,"[21] the courts have from time to time turned to an examination of the shipping documents in the hope of extracting some hint of the intention of the parties,[22] despite the fact that the courts which have specifically ad-

---

17. In Petition of Isbrandtsen Company (2 Cir. 1953) 201 F.2d 281, locomotives were held not to be packages and thus the carrier's liability was limited "per freight unit," application of which produced a $500 limit for each large locomotive but would have allowed full liability for smaller ones (201 F.2d at 286).

18. Nichimen Company v. M. V. Farland (2 Cir. 1972) 462 F. 2d 319, 334-335.

19. Standard Electrica, S.A. v. Hamburg Sudamerikanische, etc. (2 Cir. 1967) 375 F.2d 943.

20. See the dissenting opinion in Standard Electrica, S.A. v. Hamburg Sudamerikanische, etc., supra note 19; the concurring opinion in Pannell v. United States Lines Company (2 Cir. 1959) 263 F.2d 497; and the dissenting opinion in Gulf Italia v. American Export Lines, Inc. (2 Cir. 1959) 263 F.2d 135, the latter dissenting opinion having been cited with apparent approval by the majority in Standard Electrica, S.A. v. Hamburg Sudamerikansche, etc. at 947.

21. Mitsubishi International Corporation v. S.S. Palmetto State (2 Cir. 1962) 311 F.2d 382, 383.

22. Aluminios, supra page 3, at 156; Standard Electrica, S.A. v. Hamburg Sudamerikanische, etc. supra note 19, at 946; Nichimen Company v. M. V. Farland, supra note 18, at 335; Companhia Hidro Electrica v. "Loide Honduras" (S.D. N.Y. 1974) 368 F. Supp. 289.

dressed themselves to the point have held that it would violate COGSA to give effect to a definition agreed to by the parties if the consequence were thereby to reduce the carrier's liability.[23] However, this sort of investigation has generally not been helpful and may well be productive of as much confusion, uncertainty and disagreement as efforts to analyze the configuration of the shipped article itself since the documents may be equivocal and the courts are in disagreement as to whether the parties are bound by the characterizations in the documents[24] or whether they are merely evidence of the parties' intent.[25]

Difficulties have been compounded when the courts, having held the article shipped not to be a package, have then been compelled to apply the limitation "per customary freight unit." On this point, aside from the equivocation of *Stirnimann v. The San Diego* (2 Cir. 1945) 148 F.2d 141, and the reservations expressed by Judge Moore,[26] the approach has been to attempt to determine the number of units used for the computation of the freight charges. *General Motors Corp. v. Moore-McCormack Lines, Inc.* (2 Cir. 1971) 451 F.2d 24, 25. But this alternative merely leads to another area of dispute with possibly even more "elusive" considerations,

---

23. Pannell v. United States Lines Company (2 Cir. 1959) 263 F.2d 497, 498; but see concurring opinion of Judge Moore in Pannell at pp. 498-499.

24. Aluminios, at page 156 ("They must abide by its [bill of lading's] meaning"); Companhia Hidro Electrica v. S/S "Loide Honduras" (S.D. N.Y.) 368 F. Supp. 289.

25. Nichimen Company v. M. V. Farland, supra note 18, at 335; Standard Electrica, S.A. v. Hamburg Sudamerikanische, etc., supra note 19, at 946; Middle East Agency v. The John B. Waterman, supra, at 491.

26. Gulf Italia Company v. American Export Lines, Inc. (2 Cir. 1959) 263 F.2d 135, 138 (dissenting opinion); Pannell v. United States Lines Company, supra note 23 (concurring opinion).

as the opinion in *General Motors Corp., supra,* reveals.[27] And it can certainly lead to "strange results" as pointed out by Judge A. N. Hand in *Petition of Isbrandtsen Company* (2 Cir. 1953) 201 F.2d 281, 286. On the other hand, the concept of "per customary freight unit" is perfectly appropriate and indeed without reasonable alternative in the case of bulk cargoes, as in *The Bill* (D. Md. 1944) 55 F. Supp. 780; and bulk cargoes are the only cargoes to which that alternative basis for limitation under Section 4(5) should apply.

The conclusion to be drawn from the foregoing is that all of the problems of the application of Section 4(5) discussed above as to what constitutes a "package" which have bedeviled the courts for over 20 years are avoidable by recognizing that a "package" under Section 4(5) is not required to be wrapped, covered, cased, mounted or skidded but is any article separately shipped, as distinguished from bulk cargoes to which customary freight units apply.

This was the original intention of the drafters. It has already been pointed out[28] that the word "colis" in the original French text which was translated into the word "package" does not necessarily imply the presence of any wrapping or covering or the like. And the French law under the Hague Rules bears this out. The Canadian Supreme Court in *Falconbridge Nickel Mines v. Chimo Shipping* [1973] 2 Lloyds L. Rep. 470, held vessel liability for an unboxed and unskidded tractor and a similarly "unpackaged" generator to be limited to $500 each. French law was analyzed and the Court noted (p. 477) that a "colis" in

---

27. See, e.g. Judge Moore's opinion on the point in Aluminios supra at p. 156; Caterpillar Americas Company v. S.S. Sea Roads (S.D. Fla. 164) 231 F. Supp. 647, 649, aff'd per curiam (5 Cir. 1966) 364 F.2d 829; India Supply Mission v. S.S. Overseas Joyce (S.D. N.Y. 1965) 246 F. Supp. 536.

28. Footnote 10, supra.

the French language, as declared by French cases and treatises, is an individualized thing; it does not have to be wrapped or otherwise "packaged." Rene Rodiere, 2 *Traité Général de Droit Maritime* 302; *Cie. Générale Transatlantique c. Cies. The Marine Insurance Co., La Prévoyance, Assurances Générales et autres* (Court d' Appel de Paris, 5ième Chambre, Oct. 24, 1966) 19 *Le Droit Maritime Francais* 23.[29]

It will thus be seen that the excessively restricted meaning which our courts have given to the word "package" has not only caused extensive and unnecessary litigation in this country but has destroyed that uniformity among maritime nations which was one of the principal aims of the Hague Rules and of COGSA.

It is respectfully submitted that this Court should seize this opportunity to put an end to the difficulties and uncertainties produced by the misconception of the word "package" in Secion 4(5) and thereby and at the same time bring our law into concordance with that of the other maritime nations of the world under the Hague Rules.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted.

JOHN HAYS
Counsel for Petitioner

Of Counsel:
GEORGE L. WADDELL
HARVEY I. WITTENBERG
DORR, COOPER & HAYS

29. An extract of the opinion with translation of the French texts is in Appendix G, p. 27.

(Appendices follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 71-2856

Hartford Fire Insurance Company,
Plaintiff-Appellant,

vs.

Pacific Far East Line, Inc., a corporation, the vessel Pacific Bear her hull, tackle, apparel and furniture and Doe One through Doe Three,
Defendants-Appellees.

[February 4, 1974]

Appeal from the United States District Court
for the Northern District of California

Before: Chambers, Choy and Wallace, Circuit Judges

Choy, Circuit Judge:

Appellant, Hartford Fire Insurance Company (Hartford) appeals from an interlocutory judgment limiting the liability of appellee, Pacific Far East Lines (PFEL), to $500 for damage to an electrical transformer shipped aboard appellee's vessel the SS Pacific Bear. Judgment was granted after a separate trial held pursuant to F. R. Civ. P. 42 (b) and jurisdiction resides here under 28 U.S.C. §1292(b). We reverse.

The sole question presented for review is whether the large electrical transformer, attached by bolts to a wooden skid but not otherwise boxed or crated, constituted a "pack-

age" within the meaning of Section 4(5) of the Carriage of Goods by Sea Act *(COGSA)*. 46 U.S.C. §1304(5).[1]

Hartford's subrogor, the Black Construction Company (Black), ordered a 10,000 KV transformer from the General Electric Company. The transformer measured 13 feet 1 inch in height, 11 feet 7 inches in length, 7 feet 8 inches in width, and weighed some 36,700 pounds. Intended for use outdoors, the transformer was designed to stand freely on the ground or other flat surface. As a part of its normal manufacturing process, integral lifting lugs were attached to the transformer's four upper corners for purposes of its movement and transportation. Although it was thus suited and intended for handling and transporting, at the specific request of Black, General Electric also mounted and bolted the transformer to a heavy wooden skid in order to protect it during shipment. Thus fastened to its skid, the transformer was transported by railroad flatcar to San Francisco where it was loaded aboard PFEL's vessel for its destination, Agana, Guam.

The transformer was delivered to PFEL undamaged, but en route to Guam its low-voltage bushings were extensively

---

1. 28 U.S.C. § 1304(5) provides: "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in the case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

"By arrangement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained."

damaged and water vapor entered the transformer. The cost of repairing this damage, alleged to be in excess of $5,000, was reimbursed by Hartford to Black, for which Hartford now seeks recovery from PFEL. PFEL admits liability, but maintains that because the skidded transformer was a "package" it is liable only up to the $500 maximum limit of the statute, since no value for the cargo in excess of this amount was declared in the bill of lading. Hartford argues that the transformer as skidded was not a "package" within *COGSA's* definition where the transformer was not attached to the skid for purposes of its handling or transportation, but solely for the protection of the transformer. We do not accept Hartford's rationale for defining a "package," but we nevertheless conclude that the transformer was "not shipped in [a] package," and accordingly reverse and remand for a determination of PFEL's liability according to the number of customary freight units applicable to the transformer.

COGSA was enacted in 1936,[2] more than a decade after the principles embodied in the act had been agreed upon and ratified by the United States along with other commercial nations at the Ocean Bill of Lading Convention in Brussels. Commonly known as the Hague Rules, the central purpose of these earlier agreements was to establish international uniformity in certain matters relating to ocean bills of lading, on a basis fair to ocean carriers, cargo owners, insurers and bankers. *Hearings on S.B. 1152 before the Committee on Commerce, U.S. Senate, 74th Cong., 1st Sess. on a Bill relating to Carriage of Goods by Sea,* 15 (1935) [hereinafter *Hearings*]. Arrived at after long and deliberate negotiations, both the Hague Rules and the later statute were effected by compromise among the various interested

2. Act of April 16, 1936, ch. 229, 49 Stat. 1207.

parties. Then existing law was modified by *COGSA* to give greater protection to the cargo interests in several respects. The most significant of these were: (1) when goods were received by the carrier in sound condition but were delivered damaged, the burden of proof was placed on the carrier to show how the damage occurred and that the carrier was not responsible therefor; (2) owners of goods were allowed adequate time within which to file claims against the carriers where damage occurred; and (3) the carriers were to accept greater liability for damages per package without a corresponding increase in freight rates.[3] *Hearings, supra* at 18; *see Pan-Am Trade & Credit Corp. v. The Campfire,* 156 F.2d 603 (2d Cir.) *cert. den. sub nom. Waterman Steamship Corp. v. Pan-American Trade & Credit Corp.,* 329 U.S. 774 (1946).

The language of the Hague Rules was incorporated almost without change into *COGSA.* However, Congress made one revision with regard to the language of Section 4(5). Whereas the Hague Rules limit a carrier's liability "per package or unit," *COGSA* more explicitly provides that the $500 limit shall apply "per package . . . or in the case of goods not shipped in packages, per customary freight unit . . . ."[4] This change delineates more clearly than do the

---

3. *Hearings, supra* at 47 it is stated that: "Another beneficial and noteworthy provision of the Hague Rules is the stipulation which makes the carrier liable for loss or damage up to £100 per package, or unit, unless a greater value shall have been declared by the shipper and inserted in the bill of lading. This is important when we recall that present limits are usually $100 or $250; in fact, one instance is recorded of a limit of 10 francs."

4. 6A *Knauth's Benedict on Admiralty* 869, 873 (rev. 7th ed. 1969) (containing the text of the Hague Rules). *See also The Bill,* 55 F. Supp. 780, 782 (D. Md. 1944) where it is noted that the phraseology of the several successive bills read "$100 per package or unit; $500 per package or unit; $500 per package or, in case of goods not shipped in packages, per customary freight unit."

Hague Rules that the limitation on the carrier's liability depends on whether the goods are shipped in a "package," as distinguished from "goods not shipped in packages." In the latter case, based upon the number of customary freight units applicable to the non-packaged goods, liability could well exceed the statutory limit of $500 per package. It was not the purpose of the act, therefore, to relieve the carrier of its normal responsibility for damage to cargo or to unduly limit its liability for just claims when goods have not been shipped in packages. *Stirnimann v. The San Diego,* 148 F.2d 141, 143 (2d Cir. 1945).

Although the difference in limitation of liability clearly turns on whether the goods are in a "package," Congress did not define this term, and left no interpretative clues in either the statute itself or in any of the legislative hearings.[5] But surely Congress was aware of technological advances since the Hague Rules were adopted such as pallets and forklifts, which by the time of the statute's enactment were being utilized by the industry. Yet, despite such progress in the mode of transporting cargo, Congress chose to retain the commonly used term "package" in the statute, adding the alternative phrase "goods not shipped in packages." These industry advancements do not justify any overextension of the statutory term "package." *See Leather's Best Inc. v. S.S. Mormaclynx,* 451 F.2d 800, 814-15 (2d Cir. 1971) where a large metal container holding numerous small

5. The only reference in the *COGSA* hearings to a judicial decision concerning the "package" limitation occurred when it was noted that in a Supreme Court decision it was "assumed . . . that a liability limited to $100 on a car worth $3,900 was not improper." *Hearings, supra* at 39. In that case, *Reid v. Fargo,* 241 U.S. 544 (1916), the Court impliedly held that a fully boxed automobile was in a "package" for purposes of a limitation on the carrier's liability, and that the express company which had so shipped the automobile, without informing its owner, was liable for the difference in the loss of the cargo.

cartons of leather goods was held not to be a "package."

"[L]egislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." *Addison v. Holly Hill Fruit Products, Inc.* 322 U.S. 607, 618 (1944). Since no specialized or technical meaning was ascribed to the word "package," we must assume that Congress had none in mind and intended that this word be given its plain, ordinary meaning. *Malat v. Riddell,* 383 U.S. 569, 571 (1966); *Bruhn's Freezer Meats v. United States Department of Agriculture,* 438 F.2d 1332, 1338 (8th Cir. 1971). *See generally 2A Sutherland on Statutory Construction* §47.31 at 155-56 (4th ed. 1973).

The dictionary definitions of "package," though alone insufficient, provide at least a starting point in this inquiry. Webster's Third New International Dictionary 1617 (1966) defines a package as follows: "a small or moderate sized pack: bundle, parcel . . . a commodity in its container . . . a covering wrapper or container . . . protective unit for storing or shipping a commodity." The word "package" is defined in Black's Law Dictionary 1262 (rev. 4th ed. 1968) as: "a bundle put up for transportation or commercial handling; a thing in form to become, as such, an article of merchandise or delivery from hand to hand . . . As ordinarily understood in the commercial world, it means a shipping package."

In one of the first English decisions to consider the question of what is a "package," the court interpreted that term in the context of the Carrier's Act, a statute which similarly to *COGSA* limited the carrier's liability for articles "contained in any parcel or package," unless a greater value was declared for the goods. *Whaite v. Lancashire & Yorkshire Railway Co.* [1874] L. R. 9 Ex. 67. The case involved a

group of oil paintings placed into a four-wheeled wagon which had sides but no top, such that the identity of the paintings themselves was hidden, though it was clear that paintings were being transported. Bramwell, B., stated his opinion as follows:

> "I think this waggon with its contents was a 'package' within the meaning of the Act. Although one would not commonly describe it in that way, yet, looking at the object and purpose of the Act, I think we are not only entitled, but compelled to say that it was a 'package or parcel' within the section. It is to be observed that the plaintiff himself and his foreman authorize us in so describing it, for they say they 'packed' the goods in the waggon, and no one would doubt that this expression was rightly used; but if so, then the waggon so packed with goods was a package. Further, the packed waggon had this quality of a package about it, that the pictures were so packed by the plaintiff that, though the defendants could see that there were pictures in the waggon, they could not see what was the exact character of the pictures, which the plaintiff's mode of packing concealed. The rule must, therefore, be made absolute to reduce the verdict to 20£."

> Cleasby, B., also observed: "It would be absurd to say that the waggon was too large to be a package, plainly, size cannot be a criterion."

> Finally, Pollack, B., stated: "The Act uses the words 'parcel' and 'package'. Both words being used, this gives us some assistance in arriving at the meaning of what each signifies. I think that this was a package, if not a parcel."

A later decision, *Studebaker Distributors Ltd. v. Charlton Steam Shipping Co.*, [1938] 1 K.B. 459, 467, cites the language of *Whaite* approvingly, but reaches a contrary result on differing facts. The court there held that a ship-

ment of sixty unboxed automobiles could not justifiably be considered sixty separate packages, saying:

> "It seems to me that the primary object of this clause is to protect a shipowner against receiving an article of considerable value so covered as to prevent him from seeing what it is .... I do not feel that I can hold that a motor car put on a ship without a box, crate or any form of covering is a package, without doing violence to the English language."

See also Stirniman v. The San Diego, supra 148 F.2d at 143.

More recent decisions, however, because of the varied items of cargo considered, reveal far less consistency in the criteria used to determine what constitutes a "package." *See Aluminios Pozuelo Ltd. v. S.S. Navigator,* 407 F.2d 152, 154 (2d Cir. 1968). They indicate that regardless of size, shape or weight, cargo fully boxed or crated is a "package" under the act where the mode of packaging conceals the identity of the goods being shipped.[6] On the other hand,

---

6. *E.g., Leather's Best, Inc. v. S.S. Mormaclynx,* 451 F.2d 800 (2nd Cir. 1971) (99 cartons of leather goods each held a 'package'); *Mitsubishi Int'l Corp. v. S. S. Palmetto State,* 311 F.2d 382 (2nd Cir. 1962) (fully boxed rolls of steel, each weighing 32½ tons held to be 'packages'); *Deere & Co. v. Mississippi Shipping Co.,* 170 F. Supp. 479 (E.D. La. 1959) (a fully boxed tractor held to be a 'package'). *See Herd & Co. v. Krawill Machinery Corp.,* 359 U.S. 297 (1959) (implicit recognition that a fully crated, 19-ton press is a 'package'); *Reid v. Fargo,* 241 U.S. 544 (1916) *supra* note 5.

The Second Circuit has also held that, where the shipping documents did not give the carrier any notice of the number of cartons being shipped and both parties treated the shipment as 9 packages, 9 wooden pallets with 6 cardboard boxes on top of each one, bundled together by four metal straps, with a wooden deck on top, constituted 9 packages. *Standard Electrica, S.A. v. Hamburg Sudamerikanische, etc.,* 375 F.2d 943 (2d Cir. 1967). The Second Circuit later found the lack of notice and the agreement between the parties to be important distinctions when it held that 99 cartons of leather shipped in a single metal container constituted 99 packages. *Leather's Best, supra* at 815.

freestanding cargo not enclosed in a box or crate has been held to constitute goods not shipped in a "package."[7] The more troublesome decisions involve situations where some "preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods." *Aluminios, supra* at 155.

In *Pannel v. United States Lines Co.*, 157 F. Supp. 422 (S.D.N.Y. 1957) *decree modified* 263 F.2d 497 (2d Cir. 1959) a yacht, placed upon and lashed to a wooden cradle was listed in the contractual bill of lading as a "package." Since the yacht was shipped on the deck of appellant's vessel, *COGSA* was by its own terms inapplicable (see 46 U.S.C. § 1301(c)). The court held that the specific listing in the bill of lading should prevail over the general term "package" in the statute. But, the court carefully noted in *dictum* that if *COGSA* had been applicable, the yacht could hardly have been deemed a "package" so as to limit the carrier's normal liability. 263 F.2d at 498; *see Petition of United States*, 105 F. Supp. 353 (S.D.N.Y. 1952) *modified and remanded sub nom. Petition of Isbrandtsen*, 201 F.2d 281 (2d Cir. 1953) (locomotives stowed on rail and timber beds and secured by wire lashings, clips and turnbuckles held not to be a "package").[8]

---

7. *E.g., General Motors Corp. v. Moore-McCormick Lines, Inc.*, 327 F. Supp. 666 (S.D. N.Y.) *aff'd per curiam*, 451 F.2d 24 (2d Cir. 1971) (electric generator shipped without box or crate held not be a "package"); *Gulf Italia Co. v. American Export Lines, Inc.*, 263 F.2d 135 (2d Cir. 1959) (freestanding tractor with some parts covered by weatherproofing paper, but with tractor treads showing, held not to constitute a "package"); *The Bill*, 55 F. Supp. 780 (D. Md. 1944) *aff'd* 145 F.2d 470 (4th Cir. 1945) (oil shipped in bulk in two deep tanks held not to be a "package"); *Caterpillar Americas Co. v. S.S. Sea Roads*, 231 F. Supp. 647 (S.D. Fla. 1964) (uncrated and unboxed tractor held not to have been shipped in a "package").

8. In a fact situation strikingly similar to *Pannel, supra*, the facilitation of handling test was used to hold that a 42-foot yacht

Yet, in a later decision, relying on *Middle East Agency v. The John B. Waterman,* 86 F. Supp. 487 (S.D.N.Y. 1949), the court reached an apparently contrary result when a 3-ton toggle press, fastened to a wooden skid in order to facilitate handling and transportation, was held to constitute a "package" and thereby limited recovery for damages to $500. *Aluminios, supra* 407 F.2d at 155.

Both parties urge that the test of *Aluminios* of facilitating the handling or transportation of cargo be adopted in this case. But Hartford contends that the facts here are distinguishable from those in *Aluminios* since the skid was not intended to facilitate the handling of the transformer, which was already moveable by means of its lifting lugs, the sole purpose of the skid being to protect the transformer. PFEL maintains, however, that the purpose for which the skid was attached to the transformer should not be a controlling factor, and the skidded transformer should be deemed a "package" regardless of the skid's intended purpose.

Any distinction based upon the subjective purpose for which the skid was attached should not be the test for resolving the issue. The skid certainly protected the transformer to some extent, though obviously unsuccessfully, by preventing it from shifting and sliding, and from contact with other cargo during transit. And, the skid could have been utilized to facilitate the transportation of the transformer. Nevertheless, we are unpersuaded that by simply attaching the transformer to a wooden skid, the shipper created a "package." If Black had shipped the transformer

---

lashed to a wooden shipping cradle was a package. *Island Yachts, Inc. v. Pacific Lakes Line,* 345 F. Supp. 889 (E.D. Ill. 1971). The facilitation of handling test has also been used to hold that 142 three-to-nine-ton steel coils, rolled, strapped and tied with steel bands, some wrapped in burlap, constituted 142 packages. *Nichimen Co. v. M. V. Farland,* 462 F.2d 319, 334 (2d Cir. 1972).

sans skid, in no way could it be considered a "package" within the meaning of *COGSA*. *General Motors Corp. v. Moore-McCormack Lines, Inc.*, 451 F.2d 24 (2d Cir. 1971). To hold that somehow a "package" evolved from the mere attachment of the machine to a wooden skid seems a highly unreasonable result. We hold that the electrical transformer bolted to a wooden skid was "not shipped in [a] package."

Reversed and remanded.

Appendix B

United States District Court
Northern District of California

No. 49505 RHS

Hartford Fire Insurance Company,
a corporation,

Plaintiff,

vs.

Pacific Far East Line, Inc.
a corporation, et al.,

Defendants.

OPINION OF THE COURT

The sole question before the Court at this stage of these proceedings is whether the liability of defendant carrier for alleged damage to certain cargo shipped by plaintiff's subrogor which cargo is hereinafter more fully described, is limited to $500, by virtue of Section 4(5), 46 U.S.C., Sec. 1304(5), of the Carriage of Goods by Sea Act, commonly referred to as COGSA. The parties are in agreement that this depends upon whether the cargo was a "package" within the meaning of Section 4(5).[1] A separate trial of this issue was ordered by this Court, pursuant to Rule 42(b) of the Federal Rules of Civil Procedure and was duly held.

The facts relevant to this issue are not in dispute. The shipment was of an electrical transformer which was at all

1. The alternative provision of Section 4(5), referring to "customary freight unit", was not briefed or argued, and no evidence was adduced with respect thereto.

pertinent times mounted on and bolted to a skid of heavy timbers.[2] The transformer was 13 feet, 1 inch high, 11 feet, 7 inches long and 7 feet, 8 inches wide, weighing some 36,700 pounds. Along with other items separately itemized, the transformer in question was shipped on an ocean bill of lading prepared by a licensed freight forwarder employed by the shipper. The bill of lading, under the heading "No. of Pkgs.", contains the entry "#1". Under the heading "Description of Packages and Goods", it contains the entry "'*SKID ELECTRIC TRANSFORMER" followed by some numerals, possibly a serial number, not here pertinent.[3]

Upon arrival at its destination, the transformer was allegedly damaged in an amount in excess of $500, and plaintiff seeks recovery for the full amount of the damage, or in any event, some sum in excess of $500.

In seeking recovery in excess of $500, the position of plaintiff is a frontal assault upon the decision of the Second Circuit in the leading case of *Aluminios Pozuelo Ltd. v. S.S. Navigator,* 407 F. 2d 152 (1968). No distinction between the present case and *Aluminios Pozuelo* is suggested, and none

---

2. Some mention is made in certain of the cases of whether the skids were attached or the cargo palletized by the shipper for purposes of protection of the cargo or for convenience in handling and delivery, e.g., *Standard Electrica, S.A. v. Hamburg Sudamerikanische, Etc.,* 375 F.2d 943, 946 (2nd Cir. 1967), certiorari denied, 389 U.S. 831 (palletized cargo); *Aluminios Pozuelo Ltd. v. S.S. NAVIGATOR, infra,* at p. 155, and plaintiff urges this as a distinction to be considered in this case. No case, however, appears to have been decided upon this ground alone. Doubtless skidding or palletizing serves various purposes, and the alleged distinction does not commend itself to the Court.

3. There is no question but that the bill of lading was issued pursuant to, or that the shipment was subject to, COGSA. Both the bill of lading and defendant's tariff expressly so provided. Defendant's tariff also contains a provision for additional freight rates applicable to cargo declared to be valuable. The reasonableness of this tariff is not before the Court.

appears tenable. There a toggle press, of weight and size similar to the transformer here involved, and skidded in a similar fashion, was held to constitute a single "package" within the meaning of Section 4(5). The prior authorities are extensively collected and reviewed in *Aluminios Pozuelo* and the cases cited therein, and no useful purpose would be served by reviewing them here. As the court there points out, it has been held for over 20 years, since *Middle East Agency v. The John B. Waterman,* 86 F. Supp. 487 (S.D. N.Y. 1949), that a piece of skidded cargo, regardless of size, weight or value, constitutes a "package" for purposes of Section 4(5), in view of the absence of any contrary definition in the statute, and that the term has therefore become a "word of art" (407 F. 2d, at p. 156) familiar to shippers and carriers alike. If a contrary definition is desired, or if the $500 limit is unrealistic or unfair to shippers, resort may, of course, be had to Congress.

When a shipper desires to ship cargo more valuable than $500 per "package" (as "package" has been defined by the courts)[4], it has three clear alternatives: (1) it may content itself with the statutory limit of liability, (2) it may declare the excess value and pay the additional charges specified in the carrier's tariff, or (3) it may, as it has obviously done here, protect itself by taking out appropriate insurance. In the event the last of these alternatives is elected, the insurer will presumably fix its premium in light of the limited subrogation available to it under Section 4(5) and the "word of art" which "package" has become for purposes of that Section.

---

4. Obviously, the value of cargo is better known to the shipper than to the carrier, regardless of whether the method of packaging exposes or conceals the nature of the cargo.

The law requires common carriers by sea to construct and file tariffs, which are subject to review as to reasonableness by the Fedral Maritime Commission. The liabilities to which the carrier is exposed in its business are obviously elements to be considered in fixing the tariff rates. The clear purpose of Section 4(5) is to limit these liabilities in certain respects. Imperfect as this subsection may be in various respects, to hold for plaintiff in this case would be contrary to the long-standing construction of the statute by the courts. This the Court is not inclined to do.

Accordingly, it is found that the skidded transformer above described was a "package" within the meaning of Section 4(5) and that the liability of the carrier is limited in accordance with the provisions of that Section.

Defendant has lodged proposed findings of fact, conclusions of law and interlocutory judgment consistent with this opinion, with proof of service upon counsel for plaintiff, pursuant to Rule 123(a) of this Court. Plaintiff shall have 5 days following the filing of this opinion to serve and lodge a notice of disapproval, together with proposed modifications and reasons therefor, as provided in Rule 123(c), but in conformity with the views herein expressed.

It is so ordered.

Dated: ..... 19, 1970.

ROBERT H. SCHNACKE
Robert H. Schnacke
United States District Judge

Appendix C

United States District Court for the Northern District of California

No. 49505 RHS

Hartford Fire Insurance Company, a corporation,

Plaintiff,

vs.

Pacific Far East Line, Inc. a corporation, et al.,

Defendants.

Filed Dec. 11, 1970

FINDINGS OF FACT, CONCLUSIONS OF LAW, and INTERLOCUTORY JUDGMENT

This case having come on regularly for trial on the 5th day of November, 1970, before the Honorable Robert H. Schnacke, Judge of the United States District Court for the Northern District of California, on the separate issue of whether defendant is entitled to limit its liability to $500 pursuant to the provisions of 46 USC 1304(5), such separate trial having been ordered by the Honorable Alfonso J. Zirpoli March 10, 1969, John E. Droeger, Esq. appearing as counsel for plaintiff and Harvey I. Wittenberg, Esq. appearing as counsel for defendant; and the Court having heard the arguments of counsel and read the briefs, and having examined and considered the Stipulations of Fact and the documents and depositions admitted in evidence, there being no oral testimony, and the case having been submitted for decision, the Court makes the following Findings of Fact:

FINDINGS OF FACT

1. At some time prior to September 30, 1966, Black Construction Company ordered a 10,000 KV transformer from General Electric Company to be shipped from Rome, Georgia for installation in Agana, Guam.

2. Prior to shipment by General Electric Company from Rome, Georgia the transformer was mounted on and bolted to a skid made of heavy timbers, on which it was intended to and did remain securely fastened, forming a single unit, throughout the entire transit from Rome, Georgia to San Francisco by flatcar and from San Francisco to Agana, Guam by defendant's vessel the SS PACIFIC BEAR.

3. The skidded transformer had the following physical characteristics:

Height: 13 ft. 1 inch
Length: 11 ft. 7 inches
Width: 7 ft. 8 inches
Weight: 36,700 pounds

4. Certain parts and appurtenances of the transformer were separately packaged, viz., certain of its radiators were shipped on a skid, other radiators were shipped in a crate and certain high-voltage bushings were shipped in a case. In addition, certain related articles and supplies accompanied the transformer, so that the entire consignment consisted of the skidded transformer, the skidded radiators, the case of high-voltage bushings, a carton of transformer parts, a case of transformer radiators, a skidded gas cylinder, and 39 drums of petroleum oil.

5. For the purpose of arranging the ocean transportation from San Francisco to Guam, Black Construction Company employed B. H. Loveless & Co., a freight forwarder licensed by the Federal Maritime Commission since 1961, who actually prepared the ocean bill of lading subsequently

executed by defendant, including typing in the typewritten portions thereof, and who could have declared but did not declare on said bill of lading a value for said transformer in excess of $500.

6. Said ocean bill of lading prepared by B. H. Loveless & Co. and issued by defendant describes the skidded transformer as follows:

"No. of Pkgs.	Description of Packages & Goods
1	*Skid electric transformer"

a. The underlined words are part of the printed form of bill of lading.

7. Upon discharge from the SS PACIFIC BEAR at Agana, Guam, the skidded transformer was found to have sustained damage to one of its low-voltage bushings.

8. Such damage was inspected and repaired by persons employed by Black Construction Company, which was reimbursed by plaintiff for the cost thereof, an amount alleged to be in excess of $500.

9. The transformer was designed and manufactured for outdoor installation, and after removal of the skid it was permanently installed outdoors in Guam.

10. The ocean bill of lading issued by defendant Pacific Far East Line, Inc. provides that it shall have effect subject to the provisions of the Carriage of Goods by Sea Act (46 USC § 1300-1315).

11. The skidded transformer was carried by Pacific Far East Line, Inc. pursuant to its then current Guam freight tariff, which provided in part:

"RULE CARRIER'S LIABILITY:

No. 5

"The liability of the Carrier as to the value of shipment at the rates herein provided shall be determined in accordance with the clauses of the Carrier's regular bill of lading form. If the Shipper desires to be covered

for a valuation in excess of that allowed by the Carrier's regular bill of lading form, the Shipper must so stipulate in Carrier's bills of lading covering such shipments and such additional liability only will be assumed by the Carrier at the request of Shipper and upon payment of additional charge in accordance with Item 2171 of this tariff of the total declared valuation in addition to the stipulated rates applying on the commodities shipped as specified."

12. The skidded transformer is a package within the meaning of Section 4(5) of the Carriage of Goods by Sea Act (46 USC § 1304(5)).

13. Any other facts stipulated are found to be as stipulated.

The following conclusion of law, insofar as it may be considered a finding of fact, is also found by this Court to be true:

CONCLUSION OF LAW

Defendant Pacific Far East Line, Inc. is entitled to limit its liability for damage to the transformer referred to in the complaint to $500.

INTERLOCUTORY JUDGMENT

In accordance with the foregoing findings of fact and conclusion of law, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant's liability for damage to the transformer referred to in the complaint is and it shall be limited to the sum of $500.

2. If the case shall not have been settled and a dismissal filed within 60 days, it shall be placed on the civil trial calendar for trial on the remaining issues.

Dated this 11th day of December, 1970.

ROBERT H. SCHNACKE
United States District Judge

Appendix D

In the United States District Court for the Northern District of California

C-49505 RHS

Hartford Fire Insurance Company, a corporation,

Plaintiff,

vs.

Pacific Far East Line, Inc. a corporation, et al.,

Defendants.

Filed Sep. 10, 1971

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Plaintiff was insurer of a certain transformer carried by defendant in defendant's vessel PACIFIC BEAR from San Francisco to Guam in November of 1966, arriving at Guam on November 16, 1966.

2. During carriage by defendant the transformer was damaged.

3. Plaintiff's subrogor arranged for and paid for the repair of the transformer.

4. The reasonable cost of the repair of the damage was in excess of $500.

5. Plaintiff paid the said amount to its subrogor.

CONCLUSIONS OF LAW

1. Defendant is liable to plaintiff for the damage to the transformer.

2. Defendant's liability to plaintiff is limited to $500 under the provisions of 46 U.S.C. § 1304(5).

3. Plaintiff is not entitled to interest.

Dated: September 9, 1971

ROBERT H. SCHNACKE
Robert H. Schnacke
United States District Judge

Appendix E

In the United States District Court for the Northern District of California

C-49505 RHS

Hartford Fire Insurance Company, a corporation,

Defendants.

vs.

Pacific Far East Line, Inc. a corporation, et al.,

Plaintiff,

Filed Sep. 10, 1971

JUDGMENT

The above-entitled action having come on regularly for trial before the Court on the issue of damages on August 23, 1971, Harvey I. Wittenberg appearing for defendant and John E. Droeger for plaintiff, and

The Court having heard and considered the evidence and having read and considered the written arguments of counsel, and

The liability of defendant to plaintiff for certain damage to a transformer carried in defendant's vessel PACIFIC BEAR from San Francisco to Guam while insured by plaintiff having been stipulated, and

The Court, having previously held that defendant's liability to plaintiff is limited to $500 under the provisions of 46 U.S.C. § 1304(5), and

The Court having made its findings of fact and conclusions of law,

IT IS ADJUDGED that plaintiff have judgment in the amount of $500 principal plus its costs of suit herein.

Dated: Sep 10 1971

ROBERT H. SCHNACKE
Robert H. Schnacke
United States District Judge

Appendix F

Summary of decisions on the nature of a package under Section 4(5) of COGSA:

Aluminios Pozuelo, Ltd. v. S.S. Navigator (2 Cir. 1968) 407 F.2d 152—a skidded 3 ton toggle press held to be a package.

The Bill (D. Md. 1944) 55 F. Supp. 780—Bulk cargo of oaticica oil limited to $500 per freight unit of 1,000 kilograms.

Caterpillar Americas Company v. S.S. Sea Roads (S.D. Fla. 1964) 231 F. Supp. 647—Unboxed, uncrated, unskidded tractor held not to be a package.

Companhia Hidro Electrica v. S/S "Loide Honduras" (S.D. N.Y. 1974) 368 F. Supp. 289—Circuit breakers unwrapped and visible except for crating over instrument panels, mounted on steel bases, held to be packages.

General Motors Corp. v. Moore-McCormack Lines, Inc. (2 Cir. 1971) 451 F.2d 24—Electric generator agreed not to be a package, but liability limited to $500 on basis of a customary freight unit.

Gulf Italia Company v. American Export Lines, Inc. (2 Cir. 1959) 263 F.2d 135, *cert. denied* 360 U.S. 902 (1959)—Tractor with upper portion protected without skids, "semi-boxed", held not to be a package.

India Supply Mission v. S.S. Overseas Joyce (S.D. N.Y. 1965) 246 F. Supp. 536—Locomotive conceded not to be a package but liability limited to $500 on basis of a customary freight unit

Inter-American Foods v. Coordinated Caribbean Transport (S.D. Fla. 1970) 313 F. Supp. 1334—A

refrigerated trailer with cartons of frozen shrimp held not to be a package.

Petition of Isbrandtsen Company (2 Cir. 1953) 201 F.2d 281—locomotives held not to be packages, but liability limited to $500 per locomotive on basis of a customary freight unit.

Leather's Best, Inc. v. S.S. Mormaclynx (2 Cir. 1971) 451 F.2d 800—container of bales of leather held not to be a package.

Lucchese v. Malabe Shipping Co., Inc. (D. Puerto Rico 1972) 351 F. Supp. 588—Locked trailer of household goods held to be a package.

Middle East Agency v. The John B. Waterman (S.D. N.Y. 1949) 86 F. Supp. 487—unboxed, unskidded tractors held not to be packages, recovery limited to 8.54 freight units of 40 cubic feet multiplied by $500. Five parts of rock crusher shipped on skids held to be packages. One unskidded part of rock crusher held not to be a package and liability limited by customary freight unit of weight or measurement ton.

Mitsubishi International Corp. v. S.S. Palmetto State (2 Cir. 1962) 311 F.2d 382, *cert. denied* 373 U.S. 922 (1963)—boxed rolls of steel weighing 32 tons held to be packages.

Nichimen Company v. M. V. Farland (2 Cir. 1972) 462 F.2d 319—banded coils of steel weighing 3 to 9 tons held to be packages.

Pannell v. United States Lines Company (2 Cir. 1959) 263 F.2d 497 *cert. denied* 359 U.S. 1013 (1959) —COGSA not applicable *ex proprio vigore* and yacht held to be a "contractual package."

Rosenbruch v. American Export-Isbrandtsen Lines, Inc. (S.D. N.Y. 1973) 357 F. Supp. 982—container of household goods held to be a package.

Royal Typewriter Co. v. M/V Kulmerland (2 Cir. 1973) 483 F.2d 645—container of cartons of adding machines held to be a package.

Standard Electrica, S.A. v. Hamburg Sudamerikanische, etc. (2 Cir. 1967) 375 F.2d 943, *cert. denied* 389 U.S. 831 (1967)—strapped pallets of six cartons each of television tuners held to be packages.

Stirnimann v. The San Diego (2 Cir. 1945) 148 F.2d 141—parts of giant amusement crane, uncrated, held to be "separate package or freight unit," and limited to $500.

Truck Ins. Exchange v. American Exp. Freight (N.D. Ill. 1972) 1972 A.M.C. 2509—container of household goods held to be package.

United Purveyors, Inc. v. M. V. New Yorker (S.D. Fla. 1972) 250 F. Supp. 102—container of frozen fish apparently held to be a package.

Waterman S.S. Corp. v. United States S.R. & M. Co. (5 Cir. 1946) 155 F.2d 687—*cert. denied* 329 U.S. 761 (1946)—pieces of structural steel held not to be packages.

Appendix G

Extract from Decision of Canadian Supreme Court in Falconbridge Nickle Mines v. Chimo Shipping [1973] 2 Lloyds L. Rep. 470, 478-9 with translation of French text.

TEXT	TRANSLATION
Having regard to the fact that the Hague Rules, upon which the Rules in the Schedule to the Water Carriage of Goods Act are based, were initially formulated at an international convention convened at Brussels in 1924 for the purpose of establishing uniform rules relating to bills of ladings amongst maritime nations, I think it to be helpful to consider the meaning attached to the words "colis ou unité" as they occur in the same context in the Rules adopted by the Republic of France which was one of the signatories of the Brussels Convention.	
In the *Traité Général de Droit Maritime*, vol. 2, by Rene Rodiere, the learned author, after having referred with approval to the decision of this Court in the *Anticosti* case, went on to point out that a large unpacked machine is to be regarded in the same sense as a package for the purpose of interpreting the Rule in question. The learned author concluded as follows: (at p. 302)	
Le "colis" c'est donc l'élément de cargaison individualisé au titre de transport. C'est l'élément spécifique pris en charge par le transporteur. Nous ver-	The *"colis"* is therefore the individualized element of freight in terms of transportation. It is the specific element which is accepted by the forwarder. We

rons infra . . . que cette notion l'emporte sur la mention du poids mais qu'elle ne l'emporte que si la spécification est suffisante.

Le "colis" est une chose individualisée et rien d'autre. Il n'y a pas à retenir l'idée, susceptible d'en restreindre notablement la notion, qu'un colis doit être empaqueté, emballé. C'est la solution de la jurisprudence anglaise, allemande ou italienne [referring to Studebaker Distributors case, supra]. *Elle ne se* [*ustifie pas plus que celle qui voyait dans un colis quelque chose de relativement petit. Contrairement à ces deux theories, une grosse machine qui voyage "à nu" est un "colis" au sens de notre loi.*

will see later on . . . that this notion has precedence over the mention of weight but that it prevails only if the specification is sufficient.

The "*colis*" is an individualized thing and nothing else. There is no reason to retain the idea, susceptible among others to diminish its notion, that a *colis* must be packed up, wrapped. This is the solution of the English, German or Italian jurisprudence (referring to Studebaker Distributors case, above). It is not any more justified than that which saw in a *colis* something relatively small. Contrary to these two theories, a heavy machine which travels "a nu [bare]" is a "*colis*" according to our law.

A fuller discussion of the same question is to be found in *Cie. Générale Transatlantique c. Cies. The Marine Insurance Co., La Prévoyance, Assurances Générales et autres,* (*Cour d'Appel de Paris, 5ième chambre,* Oct. 24, 1966, (1967), 19 *Le Droit Maritime Francais,* 23) where it is said at p. 25:

Considérant qu'en l'absence de déclaration de valeur à l'embarquement, comme c'est ici le cas, la limite de responsabilité du transporteur maritime s'applique en vertu de l'art. 4, al. 5, de la Convention "por colis ou par unité."

Considering that in the absence of a declaration of value at the time of shipping, as is the case here, the limitation of liability of the shipper applies by virtue of the art. 4, al. #5, of the Convention "par colis ou par unite";

Considerant que, pour interpréter cette disposition, il faut retenir que la Convention s'applique, spécifiquement aux "connaissements" et que la solution de la difficulté doit donc se trouver dans les usages — ou les nécessités techniques —relatives à la redaction de ces documents, telle que celle-ci est organisée par l'art. 3, al. 3, de la Convention;

Considerant qu'en l'espèce, les connaissements remis aux chargeurs concernaient; a) 3 caisses d'un poids total brut de 4 854 livres, pour la Sté ARMCO (Assurances Générales); b) une caisse d'un poids brut de 19 750 livres, soit plus de 9 tonnes, pour la Sté Citroen (La Prévoyance); c) une voiture automobile Dodge à nu, d'un poids brut de 2 820 livres et d'un volume de 44 880 pieds cubes, destinée a Simon automobiles (The Marine Insurance Cy); que chacune de ces caisses, ainsi que la voiture, se trouvaient avoir été dûment identifiées et spécialisées par le chargeur et prises en charge comme telles par le capitaine; que celui-ci a donce reç ici une serie de colis déterminés et non pas seulement en bloc un certain poids ou un certain volume de marchandises; que, dans ce dernier cas seulement, il y aurait lieu d'appliquer la limite de 100 £ or à chaque

Considering that, to interpret this disposition, it must be retained that the Convention applies specifically to "bills of lading" and that the solution of difficulty must therefore be in the customs — or technical necessities — pertaining to the writing of these documents, as the latter is organized by the art. 3, #3 of the Convention;

Considering that in this case, the bills of lading given to forwarders concerned a) 3 cases of a total gross weight of 4,854 pounds, for the ARMCO Corporation (General Insurance); b) a case of a total gross weight of 19,750 pounds, i.e., more than 9 tons, for the Citroen Corporation (La Prevoyance); c) a Dodge car "a nu [bare]," of a total gross weight of 2,820 pounds and 44,880 cubic feet volume, destined to Simon automobiles (The Marine Insurance Co); that each one of these cases, as well as the car, had been duly identified and specialized by the forwarder and received as such by the Captain; that the latter has therefore received here a series of determined *colis* and not only a certain weight or a certain volume of merchandise in one unit; that, only in this latter case, it would be proper to apply the limit of 100 gold pounds to each unit selected by the parties, in accordance with the bill of

unité choisie par les parties, d'après le conaisement, pour mesurer la marchandise prise en charge;

Considérant que, sans doute, l'une des demanderesses soutient que le terme de "colis" implique par lui-même la notion de charge limitée et qu'une caisse pesant 9 tonnes 500 ou une voiture automobile ne sauraient donce être considerées comme des colis pour l'application de la règle limitative de responsabilité du transporteur maritime; mais que, si tel était bien le sens du mot "colis," il y a quelques siècles, lorsque les portefaix ne disposaient que de leur cou pour charger les ballots de marchandises, le sens en a glissé depuis des décennies, et maintenant que la technique des moyens de levage ou de manutention permet d'embarquer et de débarquer des charges unitaires sans commune mesure avec celles que peut déplacer un homme, le terme de "colis," tout au moins dans le langage des professionels du transport maritime, c'est-à-dire dans le sens où il est employé par le texte l'intérprétation duguel il s'agit, désigne, non pas seulement une petite charge mais toute charge individualisée, remise telle quelle au transporteur et ainsi acceptée par celui-ci, quelque soit son poids ou son volume; . . .

lading, to evaluate the merchandise which is thus received;

Considering that, without doubt, one of the plaintiffs insists that the term "colis" implies intrinsically the notion of limited load and that a case weighing 9 tons 500 or a car could not therefore be considered as "*colis*" with respect to the application of the law limiting liability of the shipping company; but that, if this were indeed the meaning of the word "*colis,*" some centuries ago, when dock hands only had their necks to put on board bunches of merchandise, its meaning has changed over decades, and, now that handling or lifting techniques make it possible to load or unload unit loads bearing no relationship with those that a man can move, the term "*colis,*" at least in the professional language of shippers, i.e., using the meaning used in the text the interpretation of which we are concerned with, designates not only a small load but any individualized load, delivered as such to the forwarder and so accepted by him, regardless of weight or volume; . . .

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1658

PACIFIC FAR EAST LINE, INC.,

Petitioner,

vs.

HARTFORD FIRE INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION

JOHN E. DROEGER
100 Bush Street
San Francisco, California 94104
(415) 982-5293

Counsel for Respondent

Of Counsel:

HALL, HENRY, OLIVER & McREAVY
100 Bush Street
San Francisco, California 94104

TOPICAL INDEX

	Page
STATEMENT	1
ARGUMENT	2
CONCLUSION	9

TABLE OF AUTHORITIES

Cases

Aluminios Pozuelo Ltd. v. S.S. Navigator, 407 F.2d 152 — 2, 3

Austin v. State of Maine, 160 Me. 240, 202 A.2d 794, cert. den. 382 U.S. 1018 — 9

The BILL, 55 F.Supp. 780 (D.Md., 1944) aff'd per curiam 145 F.2d 470 (4th Cir., 1944) — 6, 8

Blair v. Osterlein Mach. Co., 275 U.S. 220 — 5

Caha v. United States, 152 U.S. 211 — 9

Falconbridge Nickel Mines v.
Chimo Shipping,
[1973] 2 Lloyds Rep. 470 7

Gulf Italia Co. v. American
Export Lines,
263 F.2d 135 (2d Cir., 1958)
cert. den. 360 U.S. 902 5

Hormal v. Helvering,
312 U.S. 552 5

McDonald v. Thompson,
305 U.S. 263,
reh. den. 305 U.S. 676 9

Nat'l Park Bank v. Remsen,
158 U.S. 337 9

Safeway Stores, Inc. v.
Okla. Retail Grocers Assn., Inc.,
360 U.S. 334 5

Stephen v. Cherokee Nation,
174 U.S. 445 9

United States v. N.Y. Tel. Co.,
326 U.S. 638 5

Walters v. City of St. Louis,
347 U.S. 231 5

Waterman S.S. Co. v. United States
S.R. & M. Co.,
155 F.2d 687 (5th Cir., 1946)
cert. den. 329 U.S. 761 5

Statutes

Canada Water Carriage of Goods Act,
Sect. IV, r. 5 7

COGSA Section 4(5) 2, 5, 6, 7

Miscellaneous

"Visby Amendment" protocol to the
Brussels Convention, signed
by the United States, February 23, 1968 4

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1973
No. 73-1658

PACIFIC FAR EAST LINE, INC.,

Petitioner,

vs.

HARTFORD FIRE INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION

STATEMENT

The decision in this case should not be reviewed by the Court because:

(i) No clear conflict exists between the decision in this case and any rule of law arising from decisions in other circuits; (ii) the question decided in this case is of

importance only to the litigants in this case, and any rule which might be created by this case could only affect a set of circumstances likely to reoccur infrequently, if ever, in the future (any question which might be raised by the decision in this case relevant to the limitation provisions of COGSA and the Hague Rules would be within the purview of and would be very likely to be resolved by ongoing international conventions to which this country is participant); (iii) the decision properly interprets COGSA; and, (iv) the long-standing literal interpretation of that language of Section 4(5) of COGSA which pertains to "goods not shipped in packages" is the correct interpretation.

ARGUMENT

1-3. In seeking to create the appearance of a conflict between circuits petitioner relies entirely on the language of the district court below to the effect that respondent's position before that court was "a frontal assault upon the decision of the Second Circuit in the leading case of Aluminios Pozuelo Ltd. v. S.S. Navigator, 407 F.2d 152 (1968)" (Appendix B to Petition, page 13). But the district court's interpretation of respondent's position was not adopted by the court of appeals, which rejected both parties' reference to any "test" which might be disclosed by the decision in Aluminios

(Appendix A to Petition, page 10).

What the court of appeals did decide in this case is simply that this case is sui generis and should be decided on its particular facts.

A review of package limitation cases (Petition, pages 6-14; Appendix F to Petition) discloses that this "rule" is exactly what has prevailed in the Second and Fifth Circuits. All the cases show striking dissimilarities on their facts; all were decided on their particular facts. In Aluminios the object was a large, top-heavy press which simply could not travel (or even stand safely on the pier) without substantial packaging. In this case the object was a bulky transformer with its own "feet" for standing upon and its own "ears" by which it was intended to be lifted; it was clearly capable of traveling without its skid, a fact of which the court of appeals took note. (Appendix A to Petition, p. 2; 491 F.2d at 961)

Petitioner asserts that in this case and in Aluminios both courts of appeal "considered that they were deciding a question of law, not merely reviewing a finding of fact by the reviewing court." (Petition, p. 4.) This statement is not supported by the opinions. Moreover, both district courts treated the questions solely

as ones of fact.[1]

The decision in this case and that in Aluminios are not only reconcilable, as arising out of distinct fact situations, but are both so limited in application as to be properly left alone even if they had created a conflict.[2]

1/ "I find that the press on a skid is a 'package' . . ." Bonsal, J. 277 F. Supp. 1008 at 1010. In this case the question was decided by the district court as its Finding No. 12 (Appendix C to Petition, p. 19; 320 F. Supp. at 327).

2/ The subject of ocean carriers' liability limitation has been under consideration by various multi-national institutions including the International Chamber of Commerce, the Comité Maritime International and the United Nations Commission on International Trade Legislation. A resolution of virtually all future conflicts by virtue of a revised limitation based upon a uniform valuation "per kilo" rather than per package appears imminent. Ratification of the "Visby Amendment" protocol to the Brussel's Convention, which was signed by the United States February 23, 1968, would obtain such a result.

4. Petitioner's contention that all cargoes not shipped in bulk should be considered "packages" for the purpose of Section 4(5) of COGSA is itself a "frontal assault," not only on a very long line of decisions (two of which have brought up the issue on petitions for certiorari[3]), but upon the clearly expressed language and the manifest intent of the statute itself.[4]

Petitioner's argument is predicated on two demonstrably false premises: first, that Section 4(5) of COGSA must be interpreted as

---

3/ Waterman S.S. Co. v. United States S.R. & M.Co., 155 F.2d 687 (5th Cir. 1946) cert. den. 329 U.S. 761; Gulf Italia Co. v. American Export Lines, 263 F.2d 135 (2d Cir. 1958) cert. den. 360 U.S. 902.

4/ The point was not raised either before the district court or the court of appeals. For this reason alone this Court should decline to consider it, particularly since no "miscarriage of justice" is even claimed and it is clear that none exists. Hormal v. Helvering (1941) 312 U.S. 552; Blair v. Osterlein Mach. Co. (1927) 275 U.S. 220; Safeway Stores, Inc. v. Okla. Retail Grocers Assn., Inc. (1959) 360 U.S. 334; United States v. N.Y. Tel. Co. (1946) 326 U.S. 638; Walters v. City of St. Louis (1954) 347 U.S. 231.

being in effect identical to Section 4(5) of the Hague Rules; and second, that in COGSA the word "package" has exactly the same meaning as the word "unit."

The answer to the first premise is simply that in enacting COGSA Congress intended to and did materially change Section 4(5), so that it is not the same provision as found in the Hague Rules. In The BILL, 55 F. Supp. 780 (D. Md., 1944), aff'd per curiam 145 F. 2d 470 (4th Cir., 1944), after tracing the history of COGSA, its genesis from the Hague Rules and the distinctions between the Act and the Rules, the court said:

> "But it will be noted that in the United States Act the phrase 'per unit' has been expanded or changed to read 'per customary freight unit.' There was considerable delay (1923-1936) before this country passed its Act. In the intervening years several successive Bills were introduced in which the phraseology of the limitation clause at times read '$100 per package or unit'; '$500 per package or, in case of goods not shipped in packages, per customary freight unit.' Various hearings were held on these several Bills over this period of years. During these hearings, or some of them,

other varying phraseology was suggested from time to time by interested parties including among other phrases 'per declared freight unit.' The final Bill which was subsequently passed was introduced on January 17, 1935 in the Senate (S. 1152) containing the phraseology '$500 per package, lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit.' (Italics supplied.) There appear to be no committee reports which clearly explain the quoted phrase 'per customary freight unit'; but it seems reasonably clear that the phraseology finally adopted was intended to be more definite than the shorter phrase 'per unit' contained in the Hague rules. (55 F. Supp. at p. 782.)"

In Falconbridge Nickel Mines v. Chimo Shipping [1973] 2 Lloyds Rep. 470 (a case cited and quoted at great length by Petitioner-Petition pp. 14-15, Appendix G to Petition, pp. 27-30) the Supreme Court of Canada interpreted The BILL as authority for holding that Section 4(5) of COGSA was so substantially changed from the same section of the Hague Rules (and the Canada Water Carriage of Goods Act, Sect. IV, r. 5 of which is identical to the Rules) as to be of no aid in the

interpretation of the section as it appears in the Rules and the Canada Act.

After reciting the above-quoted language from The BILL, Mr. Justice Ritchie said:

> "It is thus plain to me that it was only after considerable debate that the United States adopted the present form of their statute and I am satisfied that the words 'per package or, in case of goods not shipped in packages, per customary freight unit' do constitute a change from the Hague Rules as adopted in Great Britain and in Canada, and I do not think that they afforded any substantial guidance in the solution of the problem as to the meaning of the phrase 'per package or unit' as it occurs in art. IV, r. 5. [1973] 2 Lloyd's Rep. at p. 476."

Finally, in ratifying the Hague Rules convention the Senate made very specific its reservation:

> "that should any conflict arise between the provisions of the convention and the provisions of the act of April 16, 1936, known as the Carriage of Goods by Sea Act, the provisions of said act shall

prevail."

Petitioner's second premise is equally untenable: That any law making body (whether drafting in French or English) could be presumed to have used two different words in the disjunctive intending each to mean the same as the other is directly contrary to well settled rules of interpretation. Austin v. State of Maine (1964) 160 Me. 240, 202 A.2d 794, cert. den. 382 U.S. 1018 (1966). It is a cardinal rule of construction that no part of a statute may be presumed to be redundant. Stephen v. Cherokee Nation (1899) 174 U.S. 445; Nat'l Park Bank v. Remsen (1895) 158 U.S. 337; Caha v. United States (1894) 152 U.S. 211. Significance and effect should be given to every word. McDonald v. Thompson (1938) 305 U.S. 263, reh. den. 305 U.S. 676.

In COGSA the two distinct classes of things to which the package limit applies are not "colis" or "unites" but "packages" and "goods not in packages"; to the latter class the limitation applies "per customary freight unit," not "per unit."

CONCLUSION

Petitioner strains to create the appearance of a conflict, where in fact all that exists are different cases decided on different facts wherein each fact situation is

unlikely to ever arise again. Even if a similar set of facts should occur in the future it is likely that the situation would be covered by a substantially different law or contract terms.

The sophisticated argument, raised for the first time in the petition, that "package" means the same as "unit," and that "unit" means the same as "customary freight unit" is amply rebutted by the language itself as well as the clear intent of Congress to make COGSA distinct from the Hague Rules on the point.

Respondent respectfully urges that the petition for certiorari be denied.

Respectfully submitted,

JOHN E. DROEGER

Counsel for Respondent

of Counsel:

HALL, HENRY,
OLIVER & McREAVY